

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

<b>WADE SALLINGS,</b>	)	
	)	
Employee/Grievant,	)	<b>DOCKET No. 15-02-621</b>
v.	)	
	)	<b>DECISION AND ORDER</b>
<b>OFFICE OF MANAGEMENT AND BUDGET</b>	)	
<b>OFFICE OF PENSIONS,</b>	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on July 2, 2015 in the Delaware Public Service Commission Hearing Room, at the Cannon Building, located at 861 Silver Lake Blvd., Dover, DE 19904.

**BEFORE** Martha K. Austin, Chair, John F. Schmutz, Dr. Jacqueline Jenkins and Paul Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Rae M. Mims  
Deputy Attorney General  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Gary Aber, Esquire  
on behalf of Employee/Grievant  
Wade Sallings

Kevin R. Slattery  
Deputy Attorney General  
on behalf of the Department of  
Health and Social Services

## **BRIEF SUMMARY OF THE EVIDENCE**

The Office of Pensions (“OPen”) offered and the Board admitted into evidence without objection eighteen exhibits marked for identification as A-R. OPen called two witnesses: David Craik (“Craik”), Pension Administrator and Kathy Kunkle, Deputy Pension Administrator.

The employee/grievant, Wade Sallings (“Sallings”), offered and the Board admitted into evidence without objection sixteen exhibits marked for identification as 1 -16. Sallings called one witness, Kathleen Davies, Chief Administrative Auditor, Auditor of Accounts and testified in his own behalf.

## **FINDINGS OF FACT**

Prior to his termination, Sallings was the Cash and Debt Manager with the Office of Pensions (“OPen”). He worked for the State for nineteen years of which the last six and a half were at OPen. He had no record of prior discipline.

David Craik, the State Pension Administrator and Sallings’ supervisor oversees the day-to-day functions of OPen and reports to the Director of the Office of Management and Budget (“OMB”) and the Board of Pension Trustees (“Pension Board”). The Pension Board sets administrative policy and provides oversight for the investment decisions for over \$9 billion in pension assets. It has fiduciary responsibility to act on behalf of State pension beneficiaries, including active employees and retirees. The State’s pension is audited annually. The pension audit is included in the State’s Comprehensive Annual Financial Report (CAFR).<sup>1</sup>

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<sup>1</sup> A Comprehensive Annual Financial Report (CAFR) is a set of U.S. government financial statements comprising the financial report of a state, municipal or other governmental entity that complies with the

As part of his duties, Sallings managed the Investment and Accounting section of OPeN and served as the agency's chief financial reporting officer. He supervised a staff of five positions. He was responsible to assist external audit staff with annual audit preparation, to prepare draft statements for auditor review and to prepare responses to audit comments as necessary.

Between the fall of 2013 and June of 2014, all five positions reporting to Sallings became vacant. The vacancies included three key reconciliation positions which were subsequently filled in February, May and June of 2014. During this period, however, Sallings was covering the vacancies and was recording, reviewing and reconciling investment and journal entries in the State's financial reporting process. It became apparent in August, 2014 that deadlines for providing information to the external auditors were being missed and that Sallings' office was not able to handle the volume of reconciliation work in a timely manner. Craik then assigned OPeN's Deputy Administrator to assist Sallings.

The Pension Audit was delayed by approximately two months because of the backlog of reconciliation work in Sallings' section. When the 2013 audit was drafted by the external auditors from KPMG<sup>2</sup>, it noted a significant procedural deficiency, namely, (1) there was a lack of segregation of duties in the accounting and reconciliation procedure (which is designed to prevent fraud) , and (2) extensive delays occurred in completing the reconciliations. This is the

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accounting requirements promulgated by the Governmental Accounting Standards Board (GASB). GASB provides standards for the content of a CAFR in its annually updated publication, Codification of Governmental Accounting and Financial Reporting Standards. A CAFR is "compiled" by a state, municipal or other governmental accounting staff and "audited" by an external American Institute of Certified Public Accountants (AICPA) certified accounting firm utilizing GASB requirements.

<sup>2</sup> KPMG is one of the largest professional services companies in the world and one of the Big Four national accounting and auditing firms.

first deficiency notice OPen received as part of an audit in its history.

KPMG's draft audit (including the notice of significant deficiency) was presented to OPen's internal audit committee and to the Pension Board. Unbeknownst to Sallings, the Pension Board approved a draft response to be included in the Management Representation Letter at its November 21, 2014 meeting. Craik believed the language provided adequately addressed the segregation of duties issue even though those exact words were not used in the response. In a November 26, 2014 email, OPen's Deputy Administrator forwarded the Pension Board approved response to KPMG.

Sallings learned of OPen's response language in an email from KPMG on December 4, 2014. Sallings (whose signature was required on the audit response in addition to Craik's) did not agree with the language. He forwarded the draft opinion and language to Sophia Smith<sup>3</sup> ("Smith"), on December 9, 2014 asking to discuss the response with her. Sallings never discussed forwarding the information or his request to discuss it with Smith with his supervisor or the Pension Board.

In response to Sallings' request, Smith provided alternative language for his consideration that same day. On December 17, 2014, Sallings forwarded this language to KPMG and Craik stating, "After reviewing the language in the Internal Control letter, Views of Responsible Officials, I offer this language as replacement. Please let me know if you wish to discuss." Sallings maintains he offered the language to create a dialogue and he believed he could do so because OPen was still receiving updates from KPMG and the audit had not yet been

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<sup>3</sup> In the fall of 2014, Sophia Smith worked for OPen's investment advisor, Ashford Consulting Group. Prior to that, she had been employed by KPMG and had been part of the audit team KPMG assigned to OPen. She had been involved in the 2014 audit in helping OPen to format newly required disclosures, but she had no role or responsibility to assist in preparing the management response to the 2014 audit.

finalized. Sallings never ran this language by Craik prior to sending to KPMG.

That same day, Seibert responded via email, “This looks good. I will insert it into our report.” Craik responded via email asking Sallings why he was proposing changes. Sallings asserts he was surprised when KPMG accepted the language and went to speak with Craik directly after receiving it. Craik then responded to Seibert and Sallings that OPen would not be making any changes to the audit response language.

Craik believed the replacement language Sallings submitted was inappropriate because it made no mention of the role of Sallings’ unit and it stated “management had reviewed existing relationships with external contractors...,” which in fact had not occurred. Craik testified he did not believe it was appropriate to use external contractors in the roles Sallings’ suggested. Sallings, on the other hand, did not believe the language Craik provided directly addressed the deficiency and that it unfairly laid the fault on Sallings.

Following Sallings’ receipt of Craik’s email to KPMG stating no changes should be made, Sallings emailed two individuals in the Office of the State Auditor stating:

This is language that I sent to KPMG as recommended replacement for the Views of Responsible Officials which KPMG was fine with. [Craik] has stated that he drafted this with the Board and that he is unwilling to change the language. This is something I wish to discuss to determine if I can do anything since I also sign off on the Management Representation Letter.

A Senior Audit Manager in the Auditor’s Office responded to Sallings’ email on December 17, 2014 stating that there was nothing her office could do because it was OPen management’s response. Sallings then contacted the OMB Human Resources Department to request a meeting with the Director of Management and Budget. Sallings felt at the time approaching OMB HR was appropriate because he had been required to perform the work of three positions and would now be required to sign a management response letter that included

content with which he did not agree.

Despite his concerns, after Craik advised him that the language was final and he needed to sign the document, he did sign the management response which was forwarded to KPMG on December 19, 2014. Sallings admitted it was ultimately Craik's decision. Observing that hindsight is 20-20, Sallings admitted that his communication could have been worded better.

Craik felt the communication with the Auditor's Office and OMB gave him no confidence that Sallings could continue to effectively perform his duties as OPen's Cash and Debt Manager. He notified Sallings of his intent to terminate his employment on December 23, 2014. The letter stated Sallings was recommended for termination because he sent an unauthorized document to KPMG on December 17, 2014, which contained replacement language for a section of the audit response that had already been approved by Craik and the Pension Board. The letter further highlighted the serious nature of this offense and asserted Sallings' actions constituted a clear violation of the public trust.

Sallings requested a pre-decision meeting which was held on January 14, 2015 and the decision from that meeting was mailed on January 27, 2015. Subsequently, the Director of OMB advised Sallings of his termination in a letter dated January 30, 2015.

### **CONCLUSIONS OF LAW**

Merit Rule 12.1 provides:

**Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified**

**due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.**

The Board concludes as a matter of law that Sallings committed the charged offense and was granted the specified due process rights under the Merit Rules. At issue is the language of the audit response to the deficiencies noted within OPen. At the time Sallings approached someone outside of his agency about his concerns with what had been drafted, he was unaware the language for the response had been approved by both Craik and the Pension Board.

Sallings admittedly failed to notify his supervisor that he had contacted Smith on December 9, 2014. Sallings forwarded the replacement language he received from Smith to KPMG. While Sallings added Craik to the email to KPMG, he received no prior authorization to communicate the alternative response with KPMG. The Board holds that this email communication constitutes misconduct.

The Board finds Sallings claim that this email was merely meant to open a dialogue is not credible. He states in the email that he offers the language as a replacement. When KPMG immediately responded Sallings' language would be added to the report, he did not respond back that he was only intending to foster further discussion. In fact, when Craik, questioned the change in language, Sallings also failed to respond to that email. Rather, Sallings states he went to speak to Craik in person; at that time, however, KMPG had already received and responded to Sallings' language change.

In their conversation, Craik told Sallings the original language which had been sent to KPMG had already been vetted by the Pension Board and that none of Sallings' changes would be included. Sallings then approached both the Office of the State Auditor and OMB HR to discuss his options for continuing to attempt to have his changes included through individuals

outside his agency. Sallings stated he felt OPen laid fault with him and his section and the response did not adequately address the deficiencies.

The Board finds Sallings' characterization of his actions as the equivalent of being a whistleblower illogical. Sallings failed to address his concerns through the proper channels with his employer first and initiated discussion with an individual outside of OPen with no authorization to do so. Even after learning the language had been approved by the Board, he continued to communicate with others outside his chain of command. The Board recognizes Sallings' duties allow him to contact auditors and act as a point-of-contact in daily activities. However, Sallings admits that while he is required to sign the management response, it was ultimately Craik and the Pension Board's decision to determine the language.

The majority of the Board finds Sallings committed the charged offense of unauthorized and inappropriate communication. It concludes, however, the penalty of termination was too severe for a 19-year employee with no prior record of discipline. OPen suffered no harm as the language was not changed and Sallings signed the management response, as required.

Therefore, a majority of the Board concludes as a matter of law that OPen did not have just cause to terminate the grievant because the penalty was excessive and not appropriate to the circumstances. Nonetheless, some level of discipline is warranted as a consequence of Sallings communication to replace the language in the audit response.

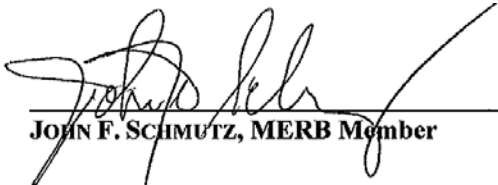
### **ORDER**

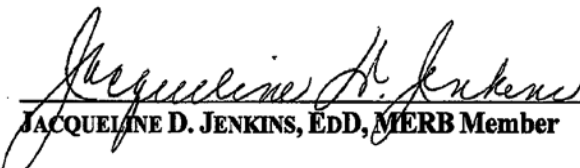
It is this **28th** day of **August**, 2015, by a vote of 3-1, the Decision and Order of the Board to grant the appeal in part and deny it in part. The Board orders the Office of Pensions to reinstate the Grievant, but demote him to a position of no less than a pay grade 18. The



Grievant will receive no back pay. Agency's counsel must report back to the Board in writing within thirty (30) calendar days of the date of this Order regarding the agency's compliance with this order.

  
MARTHA K. AUSTIN, MERB Chairwoman

  
JOHN F. SCHMUTZ, MERB Member

  
JACQUELINE D. JENKINS, EDD, MERB Member

I respectfully dissent.

  
PAUL R. HOUCK, MERB Member

## **APPEAL RIGHTS**

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **August 28, 2015**

Distribution:

Original: File

Copies: Grievant's counsel  
Agency's Representative  
Board Counsel  
MERB website